

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Rossouw (Application for Rescission) (9403/2022) [2024] ZAGPPHC 1235 (28 November 2024) [2024] ZAGPPHC 1235

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

9403/2022

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO.: 9403/2022
(1) REPORTABLE: NO
(2) OF INTEREST TO
OTHER JUDGES: NO
(3)
REVISED: NO

Date: 28 November 2024

Signature: E van der Schyff
Inthe matter between: The
Road Accident Fund
Applicant
and
Mignon
Rossouw
Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] This is an application for the rescission of a judgment granted in favour of the respondent (Ms. Rossouw or the respondent) against the applicant (the Fund or the RAF), where the matter was enrolled on the default trial roll on 29 April 2024. The Fund also seeks the variation of an order granted on 23 August 2023, which empowered the respondent to enroll the matter on the default trial roll.

Background

- [2] Ms. Rossouw lodged a claim with the Fund on 15 October 2021. The Fund did not object to the validity of the claim. Action was instituted on 16 February 2022 for damages suffered as a result of the injuries sustained by Ms. Rossouw.
- [3] Because the Fund failed to defend the claim, Ms. Rossouw obtained a referral to proceed to seek default judgment. The matter was enrolled on the default trial roll for 16 February 2023. The Fund belatedly filed a notice of intention to defend on the allocated date. The parties resolved the merits in favour of the respondent, and the quantum was postponed sine die.
- [4] The Fund filed its plea on 1 March 2023. Notices in terms of rule 35(1), 35(5), 35(8), and 35(10) were served on the State Attorney on 2 March 2023. The Fund failed to engage in litigation, necessitating the respondent to institute compliance procedures.
- [5] On 25 August 2023, an order was granted compelling the Fund to file its discovery affidavit. The order stipulated that in the event of non-compliance, the matter would be referred to the trial roll, and Ms. Rossouw was authorised to seek default judgment against the Fund.
- [6] The matter was subsequently enrolled in the default trial court on 29 April 2024 with notice to the Fund. The transcribed record of the proceedings reflects that the Fund's legal representative appeared on the day. She submitted that the respondent, the plaintiff in the trial, obtained a compelling order that the Fund failed to comply with, but because there was no application to strike out the defence the Fund was still before the court, and the matter could not proceed on default.
- [7] Ms. Rossouw's counsel submitted that it was unacceptable for the Fund to wait until the eleventh hour to oppose the default judgment application since the application was timeously served on the Fund. The court stood the matter down briefly but the parties could not find each other. When the matter was recalled, the court was called upon to make a ruling on the point in limine raised by the Fund's representative that the respondent (plaintiff) was not entitled to proceed. After hearing both parties' submissions, the presiding judges continued with the hearing. The Fund's representative indicated that she was not in a

position to take the matter further save to repeat the submission that the defence was not struck. The court granted the relief sought in the draft order.

The applicant's contentions

- [8] In this application, the Fund repeated the submissions made to Nyathi J when the question of whether the matter could proceed was raised. The Fund premises the application for rescission on Rule 42(1)(a).
- [9] The Fund essentially contends that the order granted by Burger AJ, which it seeks to vary, was incompetent in that the matter could not have been referred to be heard on a default basis unless the defence was struck. The Fund also takes issue with the fact that the order did not provide for the matter to be referred back to the trial interlocutory court if there was no compliance with the compelling order before being referred to trial. Following the above, the Fund submitted the matter could not proceed before Nyathi J on the default trial roll because the Fund's defence was still intact.

Discussion

- [10] Rule 42(1)(a) empowers a court to rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.
- [11] In the context of this matter, the first and decisive issue to be determined is whether either of the orders by Burger AJ on 25 August 2023 and Nyathi J on 29 April 2024 was granted in the Fund's absence.
- [12] The Fund was not physically present in court when Burger AJ, presiding in the trial interlocutory court, granted the compelling order. The Fund, however, does not deny that it was served with the application to compel or state that it was, for any reason, precluded from participating in the proceedings. The Fund does not proffer any explanation for its default to appear in the trial interlocutory court before Burger AJ.
- [13] The Constitutional Court explained in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[1] that the words 'granted in the absence of any party affected thereby', do not create a ground of rescission for litigants

who opted to be absent from proceedings despite having been notified thereof.

- [14] Rule 42(1)(a), therefore, does not provide an avenue for the Fund to seek a variation of the order granted by Burger AJ, and the Fund did not substantiate that it is otherwise entitled to the variation or rescission of the order granted by Burger AJ on 25 August 2023.
- [15] The Fund's legal representative was present in court when Nyathi J decided on the quantum of the claim. The Fund did not apply for a postponement. The Fund deliberately chose not to participate in the proceedings before Nyathi J, other than to raise a point in limine.

[16] It is trite that there are generally no differences in the litigation against the Road Accident Fund in matters enrolled on the trial roll and those enrolled on the default trial roll. Even where matters proceed on the trial roll, the Fund's representatives, in most cases, make submissions based on the expert evidence presented by the plaintiffs in the matters either through expert reports confirmed on affidavit or viva voce evidence.

[17] It has been held in recent matters that a defendant can still participate in the trial as far as the determination of quantum is

concerned, even where its defence was struck.[2] In casu, the Fund was served with an application for default judgment. The Fund refrained from filing any notice of intention to oppose or opposing papers. The Fund was present when the matter was called. There was no bar to the Fund actively taking part before Nyathi J, save for deliberately instructing its legal representative only to raise the point in limine. It cannot be said that the order was granted in the Fund's absence. Rule 42(1)(a) does not apply.

[18] The variation and rescission application stands to be dismissed, with costs. It is trite that costs follow success. Considering the complexity of the issues raised and the seniority of the respondent's counsel, it is just to grant costs on Scale C.

ORDER

In the result, the following order is granted:

1. The variation- and rescission application is dismissed with costs on Scale C.

E van der Schyff

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant:

Adv. R.J. de Beer SC

Instructed by:

Surita Marais Attorneys

For the respondent:

L. Sass.

Instructed by:

State Attorney, Pretoria

Date of the hearing:

21 November 22024

Date of

judgment:

28 November 2024

[1] 2021

(11) BCLR 1263 (CC) (17 September 2023) at para [56].

[2] Stevens and Another v RAF (26017/2016)

[2022] ZAGPJHC 864 (31 October 2022); Motala NO v RAF (42353/2019)

[2023] ZAGPJHC 1323 (15 November 2023); T[...] P[...] R[...] obo P[...]M [...] M[...] v Road Accident Fund (9117/2019) [2024] ZAGPPHC 387 (18 April 2024).

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Prepared on 10 October 2026 · Esheria